No. 15-446

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CUOZZO SPEED TECHNOLOGIES, LLC,
Petitioner,

v.

MICHELLE K. LEE, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, PATENT AND TRADEMARK OFFICE,
Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* NEW YORK INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF PETITIONER ON THE SECOND QUESTION PRESENTED AND IN SUPPORT OF NEITHER PARTY ON THE FIRST QUESTION PRESENTED

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. Ultra Vires Conduct by the PTO in Holding Claims Unpatentable in an IPR on Grounds Not Set Forth in the Petition is Subject to Judicial Review 5

A. The AIA Sets Strict Limits on the PTO's Ability to Institute and Decide Patentability in IPRs 5

B. There is a Strong Presumption in Favor of Judicial Review When an Executive Agency Violates its Statutory Authority 8

C. The AIA Does Not Provide Clear and Convincing Evidence that Congress Intended to Preclude Judicial Review of *Ultra Vires* Action by the PTO in Holding Claims Unpatentable on Grounds Not Raised in the Petition 10

D. The Majority's Rationales Cannot Withstand Scrutiny 14

1. Section 314(d) does not limit review of a final written decision. 14

2. Section 318(a) does not authorize the PTO to find claims unpatentable on grounds not raised in the petition. 15

TABLE OF CONTENTS
(continued)

Page

3. The Federal Circuit majority failed to apply the strong presumption favoring judicial review. 16

4. *Ultra vires* conduct does not become permissible merely because someone could have drafted a petition raising grounds that do not appear in the petition on which the PTO acted.. 17

E. The Federal Circuit's Decision Leaves No Meaningful Avenue of Relief When the PTO Exceeds its Authority 18

II. The Claim Construction Standard for IPR Proceedings Should be Informed by the Availability or Unavailability of Claim Amendments 21

III. This Court's Decision Will Have a Significant Impact on Innovation and Commerce Because of the Prevalence of IPR Proceedings 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 9

Achates Reference Publ., Inc. v. Apple, Inc.,
803 F.3d 652 (Fed. Cir. 2015) 20

Behrens v. Pelletier,
516 U.S. 299 (1996) 12

In re Bigio,
381 F.3d 1320 (Fed. Cir. 2004) 22

Bowen v. Mich. Acad. of Family Physicians,
476 U.S. 667 (1986) 8, 10, 13, 16

Burlington Indus., Inc. v. Quigg,
822 F.2d 1581 (Fed. Cir. 1987) 22

Cheney v. United States Dist. Court for the Dist. of Columbia,
542 U.S. 367 (2004) 19

Click-to-Call Techs., LP v. Oracle Corp.,
622 Fed. Appx. 907 (Fed. Cir. 2015) 20

Cohen v. Beneficial Indus. Loan Corp.,
337 U.S. 541 (1949) 12

In re Dominion Dealer Solutions, LLC,
749 F.3d 1379 (Fed. Cir. 2014) 10

Dunlop v. Bachowski,
421 U.S. 560 (1975) 9, 13

TABLE OF AUTHORITIES
(continued)

Page(s)

Gutierrez de Martinez v. Lamagno,
515 U.S. 417 (1995) 10, 17

Kerr v. United States Dist. Court for Northern Dist.,
426 U.S. 394 (1976) 19

King v. St. Vincent's Hosp.,
502 U.S. 215 (1991) 16

Kucana v. Holder,
558 U.S. 233 (2010) ..... *passim*

Lindahl v. OPM,
470 U.S. 768 (1985) 9, 17

Mach Mining, LLC v. E.E.O.C.,
135 S. Ct. 1645 (2015) ..... *passim*

Nike, Inc. v. Adidas AG,
No. 14-1719, 2016 U.S. App. LEXIS 2376
(Fed. Cir. Feb. 11, 2016) 25

Panel Claw, Inc. v. Sunpower Corp.,
IPR2014-00386, Paper 7
(P T.A.B. June 30, 2014) 27

Phillips v. AWH Corp.,
415 F.3d 1303 (Fed. Cir. 2005) (en banc) .... *passim*

In re Prater,
415 F.2d 1393, 1404-05 (C.C.P.A. 1969) 22

In re Rambus, Inc.,
753 F.3d 1253 (Fed. Cir. 2014) 23, 24

TABLE OF AUTHORITIES
(continued)

Page(s)

Reno v. Catholic Social Servs., Inc.,
509 U.S. 43, 63-64 (1993) 8

In re Reuter,
670 F.2d 1015 (C.C.P.A. 1981) 22

Sightsound Techs., LLC v. Apple, Inc.,
809 F.3d 1307 (Fed. Cir. 2015) 19

In re Skvorecz,
580 F.3d 1262 (Fed. Cir. 2009) 22

Smartflash LLC v. Apple, Inc.,
621 F. App'x 995 (Fed. Cir. 2015) 21

Square, Inc. v. J. Carl Cooper,
IPR2014-00158, Paper 36
(P.T.A.B. May 8, 2015) 27

St. Jude Med., Cardiology Div., Inc. v. Volcano Corp.,
749 F.3d 1373 (Fed. Cir. 2014) 11

Synopsys, Inc. v. Mentor Graphics Corp.,
No. 14-1516, 2016 U.S. App. LEXIS 2250
(Fed. Cir. Feb. 10, 2016) 26

United States v. Atl. Research Corp.,
551 U.S. 128 (2007) 16

Versata Dev. Group, Inc. v. SAP America, Inc.,
793 F.3d 1306 (Fed. Cir. 2015) 19

In re Yamamoto,
740 F.2d 1569 (Fed. Cir. 1984) 21, 22

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

5 U.S.C. § 704 12

28 U.S.C. § 1291 12

28 U.S.C. § 1295(a)(4)(A) 11

35 U.S.C. § 102 6

35 U.S.C. § 141(c) 11

35 U.S.C. § 144 11

35 U.S.C. § 311(a) 5

35 U.S.C. § 312(a) 2, 3, 6, 18

35 U.S.C. § 313 7

35 U.S.C. § 314(a) 2, 6, 16, 18

35 U.S.C. § 314(d) ..... *passim*

35 U.S.C. § 316 24

35 U.S.C. § 318(a) 11, 15, 16

35 U.S.C. § 319 ..... *passim*

America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) ..... *passim*

Legislative History

H.R. Rep. No. 112-98, pt. 1, at 48 (2011) 12

S. Rep. No. 79-752, at 26 (1945) 8

TABLE OF AUTHORITIES
(continued)

Page(s)

Rules

37 C.F.R. § 42.104(b)(2) 6

37 C.F.R. § 42.108 6

37 C.F.R. § 42.221(a)(3) 24

37 C.F.R. § 42.221(c) 24

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Amendments to the Rules of Practice for Trials Before the Patent Trial and Appeal Board; Proposed Rules, 80 Fed. Reg. 50,720 (Aug. 20, 2015) 25, 27, 29

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MPEP § 706 7

MPEP § 2258(G) 24

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Patent Trial and Appeal Board Statistics
(January 31, 2016) 28

Stephen G. Breyer et al.,
ADMINISTRATIVE LAW AND REGULATORY
POLICY 777 (6th ed. 2006) 9

INTEREST OF *AMICUS CURIAE*[1]

The New York Intellectual Property Law Association ("NYIPLA") is a bar association of more than 1,300 attorneys who practice in the area of patent, copyright, trademark and other intellectual property ("IP") law.[2] It is one of the largest regional IP bar associations in the United States. Its members include in-house counsel for businesses and other organizations, and attorneys in private practice who represent both IP owners and their adversaries (many of whom are also IP owners). Its members represent inventors, entrepreneurs, businesses, universities, and industry and trade associations. They regularly participate in patent litigation on behalf of both plaintiffs and defendants.

The NYIPLA's members also regularly represent parties—including both petitioners and patent owners—in inter partes review ("IPR") proceedings before the Patent Trial and Appeal Board ("PTAB") of the U.S. Patent and Trademark Office ("PTO"). The NYIPLA thus brings an informed perspective to the issues presented.

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[1] Pursuant to Sup. Ct. R. 37.6, the NYIPLA and its counsel represent that they have authored the entirety of this brief, and that no person other than the *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief.

[2] Pursuant to Sup. Ct. R. 37.3(a), Respondent's written consent to this filing is submitted herewith. Petitioner consented to the filing of *amicus curiae* briefs in support of either party or neither party in a docket entry dated February 3, 2016.

Because of the widespread use of IPRs, and the importance of such proceedings to patent owners and validity challengers alike, the NYIPLA's members and their clients have a strong interest in the issues presented in this case.[3]

SUMMARY OF THE ARGUMENT

1. The America Invents Act ("AIA"), Pub. L. No. 112-29, 125 Stat. 284 (2011), imposes strict limits on the PTO's authority in IPRs. It states that the PTO "*may not*" institute an IPR "*unless*" the "information in the petition" demonstrates that there is a reasonable likelihood that the petitioner will prevail in establishing that at least one challenged claim is unpatentable. 35 U.S.C. § 314(a) (emphasis added). The petition, in turn, must set forth "with particularity ... the grounds on which the challenge to each claim is based, and the evidence that supports the grounds for [that] challenge ...." 35 U.S.C. § 312(a)(3). If a petition fails to meet these

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[3] The arguments made in this brief were approved by an absolute majority of NYIPLA's officers and members of its Board of Directors, but do not necessarily reflect the views of a majority of the members of the Association, or of the law or corporate firms with which those members are associated. After reasonable investigation, the NYIPLA believes that no officer or director or member of the Amicus Briefs Committee who voted in favor of filing this brief, nor any attorney associated with any such officer, director or committee member in any law or corporate firm, represents a party to this litigation. Some officers, directors, committee members or associated attorneys may represent entities, including other *amici curiae*, which have an interest in other matters that may be affected by the outcome of this litigation.

requirements, it may not "be considered" by the PTO. 35 U.S.C. § 312(a).

These provisions set clear limits on the PTO's authority. They ensure that the PTO will consider patentability in IPRs *only* on grounds raised in the petition and will not hold claims unpatentable on other grounds that the petition did not raise. If the PTO violates these statutory limits on its authority, its *ultra vires* conduct should (and must) be subject to judicial review, not immune from it.

In its 2-1 decision in this case, the Federal Circuit held that *ultra vires* action by the PTO, in instituting and deciding an IPR on grounds not raised in the petition, is not subject to judicial review on appeal from a final decision in an IPR. That conclusion is at odds with a long line of decisions by this Court. It turns the statutory limits on the PTO's authority into a toothless nullity and effectively gives the PTO a blank check to expand its authority beyond clear statutory limits without judicial constraint.

Administrative agencies are obligated to act within the statutory limits on their authority. If an agency violates those limits, its conduct is subject to judicial review absent clear and convincing evidence that Congress intended otherwise. The PTO is no exception. The AIA and its legislative history do not provide clear and convincing evidence that Congress intended *ultra vires* agency action by the PTO in holding claims unpatentable to be exempt from judicial review on appeal from a final written decision in an IPR. This Court should make clear that if the PTO holds claims unpatentable on

grounds not set forth in the petition, then that *ultra vires* conduct is subject to judicial review, not exempt from it.

Section 314(d) of the AIA, which the Federal Circuit majority relied upon, does not restrict judicial review of a final written decision. That provision is part of a section entitled "Institution of inter partes review." It states that "[t]he determination by the Director whether to institute an inter partes review ... shall be final and nonappealable." 35 U.S.C. § 314(d). By its express terms, § 314(d) applies to decisions on whether to institute inter partes review—not to appeals from a final written decision, which are governed by § 319. Nothing in § 319 or any other provision bars review of whether the PTO violated the statutory limits on its authority by holding claims unpatentable on grounds not set forth in the petition.

2. On the other Question Presented, the NYIPLA does not take a position on whether the standard for claim construction in IPRs should be the "broadest reasonable interpretation (BRI)" standard that the PTO applies in patent examination, the standard set forth in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc) that courts apply in patent infringement litigation, or some other standard. The NYIPLA submits that the decision on that issue should be informed by consideration of the extent to which amendments to claims are available in IPRs.

Applying the BRI standard can result in a claim construction that is broader than the construction yielded by applying the *Phillips*

standard, and a broader construction may in turn make some claims more vulnerable to an invalidity challenge. Applying the BRI standard nonetheless is appropriate in patent examination proceedings because those proceedings involve a back-and-forth between the applicant and the patent examiner, and applicants are freely able to amend their claims in examination to address validity issues that the examiner may raise. In contrast, there is no opportunity to amend claims in patent infringement litigation, and the application of the *Phillips* standard is appropriate in that context.

IPRs do not match either paradigm. In IPRs, patentees may not freely amend claims, but do have a very limited ability to move for claim amendments. Such motions are almost always denied. The appropriate standard for claim construction should be informed by the limited extent to which such amendments are available in IPRs.

ARGUMENT

I. *Ultra Vires* Conduct by the PTO in Holding Claims Unpatentable in an IPR on Grounds Not Set Forth in the Petition is Subject to Judicial Review

A. The AIA Sets Strict Limits on the PTO's Ability to Institute and Decide Patentability in IPRs

Under the AIA, the process for instituting an IPR begins with the filing of a petition seeking inter partes review. *See* 35 U.S.C. § 311(a). By statute, the

petition must identify "*with particularity ... the grounds* on which the challenge to each claim is based, and *the evidence that supports the grounds* for the challenge to each claim." 35 U.S.C. § 312(a)(3) (emphasis added).[4] A petition that does not meet this requirement may not "be considered" by the PTO. 35 U.S.C. § 312(a).

Section 314(a) limits the PTO's ability to institute an IPR. It states:

> The Director *may not* authorize an inter partes review to be instituted *unless* the Director determines that *the information presented in the petition* ... and any response [thereto] ... shows ... a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.

35 U.S.C. § 314(a) (emphasis added).[5] Read in conjunction with § 312(a)(3), this section ensures

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[4] The applicable regulations likewise recognize that a petitioner seeking an IPR must specify the "specific statutory grounds under 35 U.S.C. 102 or 103 on which the challenge to the claim is based and the patents or printed publications relied upon for each ground." 37 C.F.R. § 42.104(b)(2).

[5] The Director of the PTO has delegated this authority to the PTAB. *See* 37 C.F.R. 42.108. The applicable regulations similarly provide that an IPR "*shall not be instituted* for a ground of unpatentability *unless* the [PTAB] decides that *the petition supporting the ground would demonstrate* that there is a reasonable likelihood that at least one of the claims challenged in the petition is unpatentable...." 37 C.F.R. § 42.108(c) (emphasis added).

that the PTO will institute and ultimately decide IPRs *only* on grounds set forth in the petition. This makes IPRs unlike patent examination proceedings, in which patent examiners search the prior art on their own initiative to identify grounds for rejecting claims as unpatentable.[6] In examinations, patent applicants have ample opportunity to distinguish prior art and respond to challenges by the examiner during the iterative, and often lengthy, examination process.

IPRs, by contrast, typically must be completed within one year and are purposely limited in scope to the grounds set forth in the initial petition. This ensures that patent owners are on notice from the outset of the grounds and evidence that are the basis for the invalidity challenge. A patent owner may then submit an initial response to the specific grounds for invalidity asserted in the petition, as permitted by the AIA, before the PTO determines whether to institute review on any or all of those grounds. *See* 35 U.S.C. § 313. Expanding the scope of an IPR beyond the grounds set forth in the petition

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[6] *See* Manual for Patent Examining Procedures ("MPEP") § 704.01 ("After reading the specification and the claims, the examiner searches the prior art."); *id.* § 706 ("With the results of the [examiner's] prior art search, ... the patent application should be reviewed and analyzed [by the examiner] ... to determine whether the claims [meet the statutory requirements for patentability by] defin[ing] a useful, novel, nonobvious, and enabled invention that has been clearly described in the specification."). The patent examiner has the "choice" of what prior art to rely upon, *id.* § 706.02(I), and what grounds to use as the basis for rejection, *see, e.g.*, *id.* § 706.02(a)(1)-(2).

contravenes the AIA, and is fundamentally unfair to patent holders.

The statutory limits discussed above are not merely suggestions. The PTO is obligated by statute to respect the limits Congress placed on its authority.

B. There is a Strong Presumption in Favor of Judicial Review When an Executive Agency Violates its Statutory Authority

As this Court has recognized, "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1651 (2015). Congress ordinarily "intends [an administrative agency] to obey its statutory commands and ... expects the courts to grant relief when an executive agency violates such a command." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986). "'It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted,'" since doing so would effectively give administrative agencies "'blank checks'" to expand their authority at will. *Id.* at 671 (quoting S. Rep. No. 79-752, at 26 (1945)).

"For that reason, this Court applies a 'strong presumption' favoring judicial review of administrative action." *Mach Mining*, 135 S. Ct. at 1651 (quoting *Bowen*, 476 U.S. at 670). "[T]he presumption favoring judicial review of administrative action" is "'well-settled,'" *Kucana v. Holder*, 558 U.S. 233, 251-52 (2010) (quoting *Reno v.*

Catholic Social Servs., Inc., 509 U.S. 43, 63-64 (1993)), and is "a familiar principle of statutory construction." *Id.* at 251.

Although this presumption is rebuttable, there is "a 'heavy burden' in attempting to show that Congress 'prohibit[ed] all judicial review' of the agency's compliance with a legislative mandate." *Mach Mining*, 135 S. Ct. at 1651 (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)). "Only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review.'" *Dunlop*, 421 U.S. at 567 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)).

This "heavy burden" is not easily met. Even statutory language that "plausibly can be read as imposing an absolute bar to judicial review" does not overcome the "usual presumption favoring judicial review of administrative action" if there is another natural reading of the statute that permits some level of review. *Lindahl v. OPM*, 470 U.S. 768, 779 (1985); *see also* Stephen G. Breyer et al., ADMINISTRATIVE LAW AND REGULATORY POLICY 777 (6th ed. 2006) ("[C]ourts start with a 'presumption of reviewability,' which means that they will interpret the asserted preclusive effect of such statutes narrowly. ... Also, courts frequently interpret language that, on its face, seems explicitly to preclude review not to do so."). So long as the statute is "'reasonably susceptible'" of an interpretation that preserves the availability of judicial review, it should be given that interpretation. *Kucana*, 558 U.S. at 251

(quoting *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995)).

The Federal Circuit majority ignored these "well-settled" and "familiar" principles, *Kucana*, 558 U.S. at 252. The majority failed to acknowledge—let alone apply—the "'strong presumption' favoring judicial review of administrative action." *Mach Mining*, 135 S. Ct. at 1651 (quoting *Bowen*, 476 U.S. at 670).

C. The AIA Does Not Provide Clear and Convincing Evidence that Congress Intended to Preclude Judicial Review of *Ultra Vires* Action by the PTO in Holding Claims Unpatentable on Grounds Not Raised in the Petition

The AIA and its legislative history do not provide clear and convincing evidence of Congressional intent to preclude judicial review and "prevent courts from enforcing its directives." *Mach. Mining*, 135 S. Ct. at 1651.

Two separate sections of the AIA address appeals in IPR proceedings. The section entitled "Institution of inter partes review" includes § 314(d), which is entitled "NO APPEAL" and states that "[t]he determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable." 35 U.S.C. § 314(d). Under this section, a decision to institute an IPR may not be challenged in an interlocutory appeal while the IPR proceeds, and a petitioner cannot appeal from a decision "not to institute an *inter partes* review." *In re Dominion Dealer Solutions, LLC*, 749 F.3d 1379,

1381 (Fed. Cir. 2014); *see also St. Jude Med., Cardiology Div., Inc. v. Volcano Corp.*, 749 F.3d 1373, 1375-76 (Fed. Cir. 2014) (same).

Section 319 is relevant here. That section is entitled "Appeal," and states that "[a] party dissatisfied with the final written decision of the Patent Trial and Appeals Board ... may appeal the decision pursuant to sections 141 and 144."[7] 35 U.S.C. § 319.

Nothing in § 319—or any other section of the AIA—limits the issues that a dissatisfied party may raise and the Federal Circuit may decide in an appeal from a final written decision in an IPR. If the PTO renders a final decision holding a claim unpatentable on grounds not set forth in the petition, the issues that may be raised in an appeal under § 319 include the question of whether the PTO exceeded the limits on its authority in doing so.

In this regard, the AIA is in accord with the Administrative Procedure Act, which provides that "[a] preliminary, procedural, or intermediate agency

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[7] Section 141(c) states that "[a] party to an inter partes review ... who is dissatisfied with the final written decision of the Patent Trial and Appeal Board under section 318(a) ... may appeal the Board's decision only to the United States Court of Appeals for the Federal Circuit." 35 U.S.C. § 141(c); *see also* 28 U.S.C. § 1295(a)(4)(A) (granting the Federal Circuit exclusive jurisdiction over any "appeal from a decision" of the PTAB in an "inter partes review under title 35"). Section 144 states that the Federal Circuit "shall review the decision from which an appeal is taken on the record before the Patent and Trademark Office." 35 U.S.C. § 144.

action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704. Similarly, many federal district court orders that are not subject to immediate review may still be raised in an appeal after a "final decision[]." 28 U.S.C. § 1291. As this Court has explained "[t]he requirement of finality precludes consideration of decisions that are subject to revision, and even of 'fully consummated decisions [that] are but steps towards final judgment in which they will merge.'" *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). The AIA affords similar treatment to institution decisions, which are "subject to revision" by the PTAB, and only "steps towards final judgment," i.e., a final written decision.

The legislative history of the AIA does not support a different conclusion. As Judge Newman explained in her dissent in this case, the "stated purpose" of § 314(d) "is to control interlocutory delay and harassing filings." Pet. App., 46a. (Newman, J., dissenting). *See* H.R. Rep. No. 112-98, pt. 1, at 48 (2011) (explaining that IPRs are intended to provide "quick and cost effective alternatives to litigation," and "not to be used as tools for harassment" through "repeated litigation and administrative attacks" on patent validity). Nothing in the legislative history suggests that Congress intended to limit the issues that can be raised in an appeal under § 319 from a final written decision, or intended for violations of the PTO's statutory authority to be insulated from judicial review in such an appeal.

The Federal Circuit majority failed to apply the "'strong presumption' favoring judicial review of administrative action." *Mach Mining*, 135 S. Ct. at 1651 (quoting *Bowen*, 476 U.S. at 670). That presumption is not rebutted here. The AIA and its legislative history do not provide "clear and convincing evidence" (*Dunlop*, 421 U.S. at 567) that Congress intended that PTO action in violation of its statutory mandate, including in holding claims unpatentable on grounds not set forth in a petition, should be insulated from judicial review when a dissatisfied party appeals under § 319 from a final written decision in an IPR. There is no indication in the AIA or its legislative history that Congress intended to give the PTO a "blank check" (*Bowen*, 476 U.S. at 671) to engage in that *ultra vires* action without the possibility of judicial review.

This Court's reasoning in *Mach Mining* is equally applicable here:

> Absent [judicial] review, the [PTO's] compliance with the law would rest in the [PTO's] hands alone. We need not doubt the [PTO's] trustworthiness, or its fidelity to law, to shy away from that result. We need only know—and know that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence.

135 S. Ct. at 1652-53 (bracketed references to the PTO added). Without judicial review under § 319, the AIA's statutory limits on the PTO's authority "would be naught but empty words." *Bowen*, 476 U.S. at 672 n.3 (citation omitted).

D. The Majority's Rationales Cannot Withstand Scrutiny

1. Section 314(d) does not limit review of a final written decision

According to the Federal Circuit majority, § 314(d) bars review in an appeal from a final decision of whether the PTO exceeded its statutory authority in holding claims unpatentable for reasons not set forth in the petition. Pet. App., 7a-8a. This misreads the statute.

By its express terms, § 314(d) applies only to "[t]he determination by the Director whether to institute inter partes review ...." It does not apply to appeals from a final written decision. As discussed above, appeals from a final decision are the subject of a separate section, i.e., § 319. Section 319 does not restrict the issues that an aggrieved party may raise, and the Federal Circuit may consider, in an appeal from a final written decision.

By the majority's reasoning, the PTO is effectively given carte blanche to issue a final decision invalidating patent claims on grounds absent from the petition, simply because its *ultra vires* conduct can be traced back to an initial violation of its statutory authority at the institution phase. The AIA does not compel this illogical result. Nothing in § 319—or anywhere else in the statute—bars an aggrieved party from asserting in an appeal from a final written decision that the PTO exceeded the limits on its statutory authority by relying on grounds not set forth in the petition in holding a claim unpatentable.

This conclusion is entirely consistent with § 314(d)'s statutory directive that the Director's determination whether to institute an IPR is "final," because an institution decision cannot be set aside in an appeal under § 319. Indeed, an IPR will have been instituted, conducted and completed before any possible appeal under § 319. This conclusion also is consistent with the statutory directive that the Director's determination whether to institute an IPR "shall be nonappealable" (§ 314(d)) because an appeal under § 319 seeks review of the PTO's final decision, not the decision to institute an IPR.

2. Section 318(a) does not authorize the PTO to find claims unpatentable on grounds not raised in the petition

If an IPR is instituted, the PTAB considers both sides' evidence and hears oral argument. It then renders a final written decision under § 318(a) on the patentability of the challenged claims.[8] The Federal Circuit majority mis-cited § 318(a) for the proposition that the AIA does not "expressly limit the [PTO's] authority at the final decision stage to the grounds alleged in the IPR petition." Pet. App., 7a. Under that incorrect reasoning, the AIA forbids the PTO from instituting an IPR on grounds not set forth in the petition, but gives it license to find claims

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[8] Section 318(a) states that "[i]f an inter partes review is instituted and not dismissed under this chapter, the Patent Trial and Appeal Board shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner and any new claim added under section 316(d)." 35 U.S.C. § 318(a).

unpatentable on any grounds whatsoever, including for reasons the PTO may not rely on in instituting an IPR in the first place. This is at odds with the statute and with basic principles of statutory construction, as well as notions of fairness and justice.

Like other statutes, the AIA "must 'be read as a whole.'" *United States v. Atl. Research Corp.*, 551 U.S. 128, 135 (2007) (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 211 (1991)). Read as a whole, the AIA imposes clear limits on the PTO's authority. Congress plainly did not authorize the PTO to hold challenged claims unpatentable on grounds that would not have provided a statutory basis for the PTO to institute an IPR in the first place. Congress did not need to repeat the limits on the PTO's authority in § 318(a) when § 314(a) already set those limits on the PTO's authority to institute an IPR to the grounds set out in a petition.

3. The Federal Circuit majority failed to apply the strong presumption favoring judicial review

The Federal Circuit majority also ignored another "familiar principle of statutory construction," i.e., the "presumption favoring judicial review of administrative action." *Kucana*, 558 U.S. at 251; *see also Mach Mining*, 135 S. Ct. at 1651 (describing this as a "'strong presumption'") (quoting *Bowen*, 476 U.S. at 670). This was further error.

The AIA does not authorize the PTO to hold claims unpatentable on grounds not set forth in the petition, given that the PTO lacks statutory authority to institute—much less decide—an IPR on

such grounds. Applying the "presumption favoring judicial review of administrative action," *Kucana*, 558 U.S. at 251, the AIA does not foreclose judicial review of the PTO's *ultra vires* conduct in an appeal under § 319 from a final decision.

At a minimum, the AIA is "reasonably susceptible" of this interpretation. By itself, that is sufficient to preserve the right to judicial review of *ultra vires* agency conduct. *Gutierrez*, 515 U.S. at 434; *see also Lindahl*, 470 U.S. at 779.

4. Ultra vires conduct does not become permissible merely because someone could have drafted a petition raising grounds that do not appear in the petition on which the PTO acted

The Federal Circuit majority also went astray in stating that it is "irrelevant" that the PTO held claims unpatentable on grounds not raised in the petition if "a proper petition [raising those grounds] *could have been drafted*." Pet. App. 9a (emphasis added). This logic would erase the statutory limits on the PTO's authority. It would give the PTO free rein to hold claims unpatentable on any grounds of its own choosing—including prior art not identified by the petitioner—so long as someone "could have" drafted a petition raising those grounds. This makes a mockery of the statute and "sets a dubious precedent for responsible proceedings." Pet. App., 31a (Newman, J., dissenting). It would make the reach of the PTO's authority coextensive with the breadth of its imagination. This untenable result also deprives patent owners of their statutory right to

respond to a petition containing the sole grounds on which the IPR might be instituted.

As discussed above, the AIA is explicit that the PTO "may not" institute an IPR proceeding "unless" the information in the petition demonstrates a reasonable likelihood that the petitioner will prevail, 35 U.S.C. § 314(a), and the petition must identify "*with particularity ... the grounds* on which the challenge to each claim is based, and the *evidence that supports the grounds* for [that] challenge ...." 35 U.S.C. § 312(a)(3) (emphases added). Nothing in the statute gives the PTO authority to hold claims unpatentable on grounds that are absent from the petition, merely because those theories "could have" been raised in a hypothetical petition by some other, imaginary petitioner.

E. The Federal Circuit's Decision Leaves No Meaningful Avenue of Relief When the PTO Exceeds its Authority

Under the decision below, there would be no effective way to challenge the agency's violation of the statutory limits on its authority. *Ultra vires* decisions by the PTO holding claims unpatentable on grounds not set forth in the petition would evade judicial review.

The Federal Circuit majority noted—without deciding—that mandamus might provide a means for reviewing this type of *ultra vires* agency action. Pet. App. 9a. But the majority also noted that the PTO has characterized prior Federal Circuit decisions as "preclud[ing] mandamus." Pet. App. 9a-10a (collecting cases). Even if mandamus were available,

it would not provide an adequate vehicle for addressing the agency's violation of the limits on its authority. Mandamus is a "drastic [remedy], to be invoked only in extraordinary situations." *Kerr v. United States Dist. Court for Northern Dist.*, 426 U.S. 394, 402 (1976). To warrant mandamus relief, the petitioner's right to relief must be "clear and indisputable," *Cheney v. United States Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380 (2004) (quoting *Kerr*, 426 U.S. at 403), and even then, relief is discretionary, *id.*, 542 U.S. at 381. As the decision below demonstrates, the Federal Circuit has shown no inclination to enforce the statutory limits on the PTO's authority to institute IPRs through mandamus or otherwise.[9]

One Federal Circuit judge has raised an alternative possibility that *ultra vires* action by the PTO might be subject to challenge under "an 'implicit and narrow' exception for agency action that plainly violates an unambiguous statutory mandate." *Versata Dev. Group, Inc. v. SAP America, Inc.*, 793 F.3d 1306, 1342 (Fed. Cir. 2015) (Hughes, J., dissenting in part). But this "implicit and narrow" exception also does not provide a meaningful avenue for challenging *ultra vires* agency action. If this exception is available at all, it would be available only in the most extreme circumstances, and again

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[9] *See* Pet. App., 10a-11a (stating that even if mandamus were potentially available and the court "were to treat [Cuozzo's] appeal as a request for mandamus, the situation here is far from satisfying the clear-and-indisputable requirement for mandamus") (footnote omitted); *see also Sightsound Techs., LLC v. Apple, Inc.*, 809 F.3d 1307, 1345 (Fed. Cir. 2015) (same).

would be subject to a court's discretion. Moreover, the Federal Circuit has held that this implicit exception does not provide a basis for challenging other *ultra vires* conduct by the PTO.[10]

A party aggrieved by unauthorized administrative action should not be relegated to hoping that mandamus or an implicit exception provides a basis for judicial review. Under § 319 of the AIA, *ultra vires* conduct by the PTO in holding claims unpatentable on grounds not set forth in a petition should be reviewable in a direct appeal from a final written decision in an IPR.

The NYIPLA urges this Court to hold that on appeal under § 319 from a final written decision an aggrieved party may challenge *ultra vires* actions taken during the course of the IPR, including PTO action finding claims invalid based on grounds not set forth in the petition.

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[10] *See Achates Reference Publ., Inc. v. Apple, Inc.*, 803 F.3d 652, 658 (Fed. Cir. 2015), petition for cert. dismissed (Feb. 9, 2016) (holding that assertions that the PTO acted in an *ultra vires* fashion in holding claims unpatentable where the IPR petition was allegedly time-barred by the AIA involve "statutory interpretation dispute[s]" that do not warrant review under this implicit exception); *Click-to-Call Techs., LP v. Oracle Corp.*, 622 Fed. Appx. 907, 908 (Fed. Cir. 2015), cert. pending (same)

II. The Claim Construction Standard for IPR Proceedings Should be Informed by the Availability or Unavailability of Claim Amendments

The claim construction standard that the PTO should apply during IPR proceedings is an issue of "powerful consequence" because claim construction can dictate the outcome on validity. Pet. App., 62a-63a, 67a (Newman, J., dissenting) (citation omitted); *see also Smartflash LLC v. Apple, Inc.*, 621 F. App'x 995, 1006 (Fed. Cir. 2015) (Newman, J., dissenting) (applying the broadest reasonable interpretation "render[s] the claims more vulnerable to invalidity than if reviewed on the [*Phillips* standard]").

While the NYIPLA does not take a position on whether the BRI standard, the *Phillips* standard, or some other standard should apply in IPRs, it submits that the Court's determination of this critical issue is needed and should be guided by the following inquiry: If the PTO's construction of a claim in an IPR renders the claim vulnerable to being held unpatentable, does a patent owner have a sufficient opportunity to amend the claim at issue so as to warrant application of the BRI standard?

During the iterative process of patent examination, the PTO applies the "broadest reasonable interpretation" (BRI) test for claim construction. "The PTO broadly interprets claims during examination of a patent application since the applicant may amend his claims to obtain protection commensurate with his actual contribution to the art." *In re Yamamoto*, 740 F.2d 1569, 1571 (Fed. Cir. 1984) (citation omitted). "Patent application claims

are given their broadest reasonable interpretation during examination proceedings, for the simple reason that before a patent is granted the claims are readily amended as part of the examination process." *Burlington Indus., Inc. v. Quigg*, 822 F.2d 1581, 1583 (Fed. Cir. 1987) (citing *In re Prater*, 415 F.2d 1393, 1404-05 (C.C.P.A. 1969)); *see also In re Bigio*, 381 F.3d 1320, 1324 (Fed. Cir. 2004).

The objective of the BRI test is not to determine the "actual meaning" of a claim, but rather to ascertain its outer boundaries and "reduce the possibility that, after the patent is granted, the claims may be interpreted as giving broader coverage than is justified." *In re Reuter*, 670 F.2d 1015, 1015 (C.C.P.A. 1981) (quoting *Prater*, 415 F.2d at 1404-05). As the Federal Circuit has explained:

> The protocol of giving claims their broadest reasonable interpretation during examination ... is solely an examination expedient, not a rule of claim construction. Its purpose is to facilitate exploring the metes and bounds to which the applicant may be entitled, and thus to aid in sharpening and clarifying the claims during the application stage, when claims are readily changed.

In re Skvorecz, 580 F.3d 1262, 1267 (Fed. Cir. 2009).

In contrast, during district court litigation, a patent owner is not permitted to amend the issued claims in dispute. *See Yamamoto*, 740 F.2d at 1572 ("An applicant's ability to amend his claims to avoid cited prior art distinguishes [examination]

proceedings before the PTO from proceedings in federal district courts on issued patents.... This opportunity is not available in an infringement action in district court."). A district court accordingly determines the "ordinary meaning" of a challenged claim term to a person of ordinary skill in art in view of the patent's specification and prosecution history, under the guidelines for claim construction set forth in *Phillips*, 415 F.3d at 1314, 1321.

The majority and dissent here agreed that the availability of claim amendments is an important consideration in deciding the appropriate standard for claim construction. But they disagreed on how this factor applies to IPR proceedings.

The Federal Circuit majority recognized that the BRI test typically applies in post-examination procedures before the PTO, including patent reexaminations, reissues, and interferences. But the BRI standard is appropriate in those proceedings because amendments are usually allowed, as in original examinations.

This tenet is borne out by circumstances in which the PTO does not apply the BRI standard. For example, when "a reexamination involves claims of an expired patent, a patentee is unable to make claim amendments." *In re Rambus, Inc.*, 753 F.3d 1253, 1256 (Fed. Cir. 2014) (citations omitted). In those situations, the PTO does not apply the BRI standard and instead "applies the claim construction

principles outlined by [the Federal Circuit] in *Phillips*." *Id.* at 1256.[11]

IPR proceedings are unlike the other types of PTO proceedings discussed above because there is only a limited ability to amend claims in IPR proceedings. As Judge Newman observed in dissent, "[t]here is no *right* of amendment" in IPRs. Pet. App., 39a (Newman, J., dissenting) (emphasis added). In an IPR (unlike an original examination) a patent owner cannot freely amend claims, but rather must seek leave to amend and only one motion for leave to amend is allowed as of right. *See* 35 U.S.C. § 316(d)(1).[12] The PTO's implementing regulations further restrict the ability to move for an amendment by requiring the patent owner to first confer with the PTO, and by setting a presumption "that only one substitute claim would be needed to replace each challenged claim." 37 C.F.R. § 42.221(a)(3). Moreover, unlike other aspects of IPR practice, the burden for amendments falls on the patent holder,

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[11] *See also* MPEP § 2258(G) ("In a reexamination proceeding involving claims of an expired patent, claim construction pursuant to the principle[s] set forth by the court in *Phillips*, should be applied since the expired claim[s] are not subject to amendment.").

[12] In order to file additional motions to amend, a patent owner must obtain authorization from the PTAB. Such authorization may be provided only when there is "a good cause showing or a joint request of the petitioner and the patent owner to materially advance a settlement." 37 C.F.R. § 42.221(c); *see* 35 U.S.C. § 316(d)(2).

who must prove the patentability of any proposed amendment.[13]

Thus, in contrast to original patent examination, amendments in IPRs are not freely granted. In fact, the PTO recently rejected suggested changes to its regulations which would have provided that "motions to amend should be liberally allowed." Amendments to the Rules of Practice for Trials Before the Patent Trial and Appeal Board; Proposed Rules, 80 Fed. Reg. 50,720, 50,723-24 (Aug. 20, 2015). The PTO explained that the AIA sets "statutory limitations for amendments" and thus "motions to amend cannot be entered in the same way as amendments that are entered during prosecution, which are not bound by such restrictions." *Id.*

The PTO also intervened in a recent appeal challenging the denial of a claim amendment during an IPR, to emphasize that "[t]he AIA does not provide an automatic amendment to the patent upon filing a motion clarifying the scope of the claim."

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[13] The Federal Circuit recently confirmed that although the AIA "places the burden on the petitioner to prove unpatentability of any issued claim for which the Board has instituted review," for a proposed substitute claim the PTAB appropriately "place[s] the burden on [the patent holder] to establish patentability over the prior art." *Nike, Inc. v. Adidas AG*, No. 14-1719, 2016 U.S. App. LEXIS 2376, at *13 (Fed. Cir. Feb. 11, 2016). However, the Federal Circuit held that the PTAB erred by requiring the patent holder to address the patentability of its proposed amendment over prior art beyond that which was (or pursuant to the "duty of candor" should have been) already of record. *Id.* at *49-*51.

Brief of Intervenor—Director of U.S. PTO, *Prolitec, Inc. v. ScentAir Techs., Inc.*, No. 15-1020 (Fed. Cir.) (March 31, 2015), at 25. The PTO asserted that it is incorrect to "presume[] [that] a 'motion to amend' a patent during an inter partes review proceeding should be treated similar to an amendment submitted during an examination proceeding." *Id.* at 26.

The restrictive nature of amendments in IPR proceedings is borne out in practice. As of January 1, 2016, the PTO has granted just 26 of 472 motions made by patent owners to substitute claims in the course of an IPR, i.e., only 5.5% of such motions.[14]

The Federal Circuit majority here acknowledged that "the opportunity to amend is cabined in the IPR setting," but stated that the possibility of amendment is "nonetheless available," and concluded that the BRI standard accordingly is appropriate for IPR proceedings. Pet. App., 17a. Judge Newman disagreed, concluding that the "restricted role of amendment in the America Invents Act proceedings comports with the intended and expected 'correct' claim construction, not the broadest claim construction." *Id.*, 39a-40a (Newman, J., dissenting).

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[14] *See Synopsys, Inc. v. Mentor Graphics Corp.*, No. 14-1516, 2016 U.S. App. LEXIS 2250, at *78 (Fed. Cir. Feb. 10, 2016) (Newman, J., dissenting) (citing statistics and explaining that "[a]lthough the AIA authorizes claim amendment, PTO statistics demonstrate the PTAB's practice of denying almost all motions to amend") (citing D.F. Klodowski and D. Seastrunk, *Claim and Case Disposition*, AIA BLOG, http://www.aiablog.com/claim-and-case-disposition/).

Notably, the PTO acknowledges that the *Phillips* standard, rather than the BRI standard, should apply in IPR practice in those rare situations where claim amendments are entirely unavailable—as is the case with other proceedings before the PTO. The PTO therefore applies *Phillips* to patent claims that have already expired, both in institution decisions[15] and final decisions.[16]

The PTO also has proposed a change to its regulations that would require it to apply the *Phillips* standard in deciding whether to institute IPR proceedings for a discrete category of claims, i.e., non-expired claims that will expire before a final decision. *See* 80 Fed. Reg. 50,720, 50,722, 50,743, 50,746-47 (Aug. 20, 2015). The PTO stated that application of the *Phillips* standard for construction of such claims is "appropriate," since "[s]uch patents *essentially lack any viable opportunity to amend the claims* in an AIA proceeding." 80 Fed. Reg. 50,722 (emphasis added).

The question presented here is whether, regardless of patent expiration, patent owners involved in an IPR proceeding truly have a "viable

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[15] *See,* e.g., *Panel Claw, Inc. v. Sunpower Corp.*, Case IPR2014-00386, Paper 7, Decision Denying Institution of *Inter Partes* Review, at 7 (P.T.A.B. June 30, 2014) (construing claims of expired patent pursuant to *Phillips* in deciding whether to institute an IPR).

[16] *See,* e.g., *Square, Inc. v. J. Carl Cooper*, Case IPR2014-00158, Paper 36, Final Written Decision, at 5-6 (P.T.A.B. May 8, 2015) (at final decision stage, applying *Phillips* to construe claims of patent that expired subsequent to the institution of the IPR).

opportunity to amend the claims" that is sufficient to warrant application of the BRI standard, as opposed to the *Phillips* standard that applies in district court litigation and other contexts where there is no opportunity for amendment, or some other claim construction standard that the Court concludes is appropriate in light of the unique nature of IPR proceedings. This is a question of great significance, and guidance from this Court is sorely needed.

III. This Court's Decision Will Have a Significant Impact on Innovation and Commerce Because of the Prevalence of IPR Proceedings

IPR proceedings first became available in September 2012, following the enactment of the AIA. Since then, their use for challenging patent validity has become increasingly widespread. To a large extent, they are supplanting district court litigation for resolving patent validity issues based on the prior art.

According to statistics published by the PTO, from September 2012 through January 2016 more than 4000 IPR petitions were filed. Over the past three fiscal years, the PTO has instituted review in more than 65% of the petitions that were not settled or withdrawn before an institution decision.[17] In total, 792 IPRs reached a final decision; in 685 of

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[17] *See* PTAB Statistics, January 31, 2016, at pp. 2, 7, U.S. Patent and Trademark Office, *available at* http://www.uspto.gov/sites/default/files/documents/2016-01-31%20PTAB.pdf (last accessed February 25, 2016).

them (86%), the PTO invalidated some or all of the challenged claims.[18] As a result, validity challengers have petitioned the PTO to institute IPR proceedings at skyrocketing rates, instead of raising obviousness and anticipation defenses in district court litigation.[19] Because of the increasing prevalence of IPR proceedings, the issues presented by this case have great importance for patent law, and for innovation and commerce.

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[18] *Id.* at 9.

[19] The vast majority of IPR proceedings take place in parallel to co-pending district court litigation. *See* B.J. Love & S. Ambwani, *Inter Partes Review: An Early Look at the Numbers*, 81 U. Chi. L. Rev. Dialogue 93, Appendix B (2014) (reporting that through March 2014, 78.8% of IPR proceedings had co-pending litigation); Perkins Coie, *Inter Partes Review Proceedings: A Third Anniversary Report*, at pp. 5, 7 (Sept. 2015), available at https://www.perkinscoie.com/en/news-insights/inter-partes-review-proceedings-a-third-anniversary-report.html (last accessed February 25, 2016) (reporting that 90.9% of the IPR petitions filed through August 17, 2015 had co-pending district court litigation).

CONCLUSION

On the second Question Presented, this Court should hold that in an IPR the PTAB is not authorized to invalidate a patent claim on a ground not set forth in the petition, and that such *ultra vires* conduct by the PTO is subject to judicial review by the Federal Circuit in a direct appeal under § 319 from a final decision.

On the first Question Presented, this Court should consider the extent to which claim amendments are available during IPRs in determining the claim construction standard that should apply in such proceedings.

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